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HAROLD B. WILLEY,

No. ~~553~~ 17

IN THE

Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA, *Petitioner*

v.

ALFRED C. BERGH, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Joint Resolution of June 29, 1938 (52 Stat. 1426, 5 U.S.C. 86(a)[1]) operates to repeal the Joint Resolution of January 6, 1885 (23 Stat. 516, 5 U.S.C. 86[2]), requiring the payment of so-called "holiday gratuity pay" or extra compensation to federal per diem employees for work performed on holidays.

[1] This statute is set forth in the Petition for Writ of Certiorari herein, p. 2.

[2] This statute is set forth in the Petition for Writ of Certiorari herein, p. 3.

Reasons for Denial of Writ

The United States Court of Claims has meticulously considered the issue which petitioner herein is asking this Court to review, not only once but on two separate occasions. Its lengthy and well-reasoned opinions rendered on both of these occasions (in the latter of which the Chief Judge joined although he had dissented from the first) demonstrate the lack of merit in the position taken by the Government in respect to this issue. The decision below is clearly correct, so that there is no need for this Court to grant the Petition for Writ of Certiorari herein.

In determining the error in petitioner's position, it is necessary to bear in mind the precise question which lies at the heart of this case and which has been resolved by the Court below adversely to the Government. That question is not, as framed in the petition herein (p. 2), whether federal per diem employees are entitled to an extra day's pay for work on holidays during the period of World War II when such holidays were made regular working days by administrative decree. Rather, the question is whether the Congressional Joint Resolution of 1938, enacted prior to World War II and upon which the Government relies exclusively as reason for denial of such extra day's pay,[1] has as its purpose and effect the repeal of existing statutory law (the Joint Resolution of 1885) which had been consistently construed and applied to require the payment of extra pay to per diem employees who were required to work on

[1] At no time in its arguments before the Court of Claims, i.e., either in the **Kelly** case or in the present one, did the Government contend that the May 12, 1943, directive of the President, requiring holiday work during the war period, operated in itself to repeal the 1885 Joint Resolution. It is fundamental that the Executive may not overrule the express or implied will of Congress respecting the status, tenure or compensation of federal employees. **Roth v. Brownell**, 215 F. 2d 500; **Youngstown Sheet & Tube Co. v. Sawyer**, 343 U.S. 579.

holidays.[1] Talk, therefore, of wartime requirements for work on holidays is entirely immaterial, and the Government's stressing of the wartime factor is entirely misplaced. It was precisely because the meaning and the effect of the law passed in 1938, and the intent of Congress as of that time was the basic issue before the Court of Claims that that Court "overlooked" (as petitioner phrases it, Petition p. 14) the wartime situation which came into existence some five years after the law whose effect the Court was being asked to determine had been enacted. Further and for that same reason, the considerations which the petitioner enumerates as "affording in normal times . . . ample justification for paying an employee bonus or premium pay when he works on a holiday" are quite relevant to a determination of whether the Congress intended to ignore them in legislation passed in the normal (i.e., non-war) year of 1938. These considerations as enumerated by petitioner (pp. 13, 14 of its Petition herein) are as follows:

> "Holiday work is more onerous and burdensome than work on a regular week day. A holiday is a day for religious, patriotic, or recreational pursuits. Assignment to holiday work involves on the part of the employee a departure from the normal way of living. These considerations justify payment of premium pay to those Federal employees who are required to work when other Federal employees are excused from work and allowed to enjoy an uninterrupted holiday without loss of pay."

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[1] The question was framed by the Court of Claims in its decision below as follows: "Did the Joint Resolution of 1938 operate to repeal the prior Congressional enactment?" (App. to Petition, p. 2.) That is the question which was presented and litigated before the Court of Claims in both the Kelly case (Kelly v. United States, 119 C. Cls. 197) and in the present one, and before this Court in United States v. Kelly, 342 U.S. 193, although that case was decided by this Court on other grounds.

Surely, it would seem to require much more specific language than that contained in the Joint Resolution of 1938 to convince that Congress then intended to disregard considerations such as the foregoing and to overturn a 40-year practice of granting premium pay to federal per diem employees who were required to work on holidays.

1. We start with the fact that in 1938, when Congress passed the Joint Resolution whose effect this Court is being asked to determine, there was in effect and had been in effect for over 50 years a law which the Court below, as well as this Court, had found to be "consistently administered as providing for gratuity pay in addition to regular compensation if the employee worked on a holiday" (342 U.S. at 194).[5] The construction given the 1885 Resolution by the Comptroller General of the Treasury (13 Comp. Dec. 40) is illuminating. He held in respect to the 1885 and 1895 Acts as follows:

> "These statutes allow or grant to certain employees of the Government the holidays specified with regular pay. The pay is not for service performed or labor performed, but is a gratuity. It is not intended that the employees shall perform any service for the pay given them by these joint resolutions. The pay has no relation to work. If the public interests require that these employees shall work on the stated holidays and they do work, then if they receive only the pay given by the joint resolutions they have not been paid for their labor, but have received merely the gratuity which they were entitled to without working. They are, there-

[5] Although this Court made such determination in respect to the Act of 1895 (28 Stat. 601, 607, par. 46), that Act, relating to Government Printing Office employees, was the exact counterpart of the Joint Resolution of 1938, and this Court cited opinions of the Comptroller of the Treasury construing the 1885 Resolution to grant gratuity pay. (8 Comp. Dec. 322 (1901); 13 Comp. Dec. 40 (1906); 3 Comp. Gen. 411 (1924).)

fore, entitled to pay at the rate of their regular per diem pay for work on the holidays in addition to the gratuity pay given them by the statutes referred to; that is, to double the amount of their regular per diem pay when they work all day."

2. It is to be noted that the 1938 Joint Resolution does not expressly repeal the 1885 enactment, but rather repeals it only to the extent of any inconsistency or conflict. Further, it is to be noted that the 1938 Resolution is, as found by this Court in the *Kelly* case, "silent on the subject of gratuity pay for holidays on which work was performed" (342 U.S. at 194), and the law in question deals by its express terms only with the subject of pay when per diem employees are *prevented* from working because of the occurrence of a holiday. It has been many times determined by this Court that repeals by implication are not favored. (see *Federal Trade Commission* v. *A.P.W. Paper Co.*, 328 U.S. 193); the general rule is that Congress will not be presumed to intend overturning long-established legal principles unless such intention is clearly evidenced by express declaration or necessary implication (*Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U.S. 41; *Scarborough* v. *Atlantic Coast Line*, 178 F. 2d 253; 50 Amer. Jur., "Statutes," Sec. 34).

3. The 1938 Resolution can be applied consistently with the 1885 Resolution; there is no conflict between the language of the two statutes. The 1938 Resolution, read literally, operates simply to clarify the 1885 law in two respects: (1) It permits holiday pay for holidays on which no work is performed, but only if employees were prevented from working because of the occurrence of the holiday itself, and (2) it permits holiday pay for holidays that have been administratively decreed in addition to holidays that have been statutorily declared. Thus, there is nothing in the literal language of the 1938 enactment which is in any way

inconsistent with the Act of 1885 to the extent that the Act of 1885 requires premium pay for holidays on which work is actually performed and, of course, there is nothing in the language of the 1938 Resolution either directly or indirectly repealing such requirement for premium pay for holidays worked. If Congress had had any intention whatsoever of terminating the long-standing practice of paying premium pay for holidays worked, it could easily have done so by express language directed to that end. That it did not use such language is significant.

4. The legislative history of the Joint Resolution of 1938 is completely lacking in any indication whatsoever of an intent to abolish the practice of premium pay for holidays worked, nor indeed does that legislative history reveal even the suggestion of a complaint that it was inequitable or uneconomical or otherwise improper for the federal government to pay its per diem employees premium pay for holidays worked.* Far from the legislative history revealing any intent to repeal the 1885 enactment, that history reveals conclusively that Congress, in passing the 1938 Joint Resolution, was concerned solely with the two problems mentioned in paragraph 3 above, namely, the problem of giving

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* It was the general practice of private industry in 1938 to pay some type of premium pay for holidays worked, and, as pointed out by Judge Madden in the majority opinion in the Kelly case, 119 Ct. Cls. 197, at 207, "in no case which we have heard of, or can imagine, could an employer maintain a practice whereby an employee who worked on a holiday received merely the same pay as one who did not work." The only available study for the period immediately preceding 1938 which is in any way comprehensive of the situation respecting the payment of extra pay for holidays worked is that of F. Beatrice Brower for the National Industrial Conference Board, New York City (1937), "Personnel Practices Governing Factory and Office Administration." The study covered some 350 industrial concerns. The report found that over 60 per cent of these companies paid some type of premium or gratuity to their employees for work performed on holidays, the extra pay varying from one and one-quarter times the regular rate up to double time.

the same status for gratuity pay purposes to holidays established by executive order as to holidays established by statute, and the problem of eliminating a situation under which a per diem employee, although not called to work, received gratuity pay on holidays which fell on a day such as Sunday when the employee would not have worked in any event. This legislative history is set forth fully in the majority opinion of Judge Madden in the *Kelly* case. In summary, the 1938 Resolution was brought into being originally for the purpose of correcting an injustice to wage-rate employees which grew out of an Executive Order, dated December 6, 1937, excusing federal employees from duty on December 24, 1937. (Executive Order No. 7763, dated December 6, 1937; see H.R. Rep. No. 2683 (1938) 75th Cong., 3rd Sess.) Since the Executive Order failed to provide pay for the holiday, wage-rate employees lost their wages for the day. To remedy this situation, Mr. Ramspeck introduced a Resolution (H.J. Res. 551, introduced on January 5, 1938) in the House of Representatives, providing compensation for such employees who were excused from duty on that day. This Resolution was referred to the Committee on Civil Service. The Committee was advised by the United States Civil Service Commission that "there is the broader question involved of securing statutory authority for such payments as a general practice and thus obviate the necessity for special resolutions by Congress." (H.R. Rep. No. 2683, page 2.) Thus, it is clear that the immediate purpose of the 1938 Resolution was to eliminate the loss of wages by wage-rate employees caused by administratively-decreed holidays. See, in addition, 83 Cong. Rec. 9466 (1938).

In regard to the problem of eliminating the practice of paying gratuity pay to wage-rate employees, even though they did not work and even though the holidays fell on a

non-working day, the debates and discussions attending the 1938 Resolution throw no particular light on the subject, but the Committee Report above referred to makes it quite clear that Congress did have this problem in mind. The Committee Report incorporates a letter from the Acting Comptroller General to the Secretary of the Navy. That letter in relevent portion stated as follows:

> ". . . when any of such holidays falls on a nonworkday (such as a Saturday), such employees receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned, and double compnesation for the day if work is performed thereon." . . .
>
> "During the calendar year 1936 navy yard per diem employees, as well as other per diem employees of the Government to whom the 40-hour-week statute is applicable, were paid 3 days' gratuity pay under the holiday statutes, over and above their full earnings for the year, by reason of the fact that February 22, May 30, and July 4, 1936, fell on Saturday nonworkdays. (See 15 Comp. Gen. 700 id. 809.) It is noted in this connection that December 25, 1937, and January 1, 1938, each will fall on a Saturday.[4]

It is obvious that this passage does not refer to gratuity pay for wage-rate employees required to work on a statutory holiday occurring on a *regular workday*. The reference to "double compensation" relates to the payment of such compensation to wage-rate employees required to work on a statutory holiday occurring on a nonworkday. Clearly, if gratuity pay is eliminated for statutory holidays occurring on nonworkdays, the employee required to work on such days would not receive "double compensation," but would merely receive his regular rate of pay for the day. Thus, it is apparent that the Committee Report did not specifi-

cally deal with the subject of gratuity pay for employees required to work on statutory holidays occurring *on regular lar workdays* although it did consider the question of gratuity pay for holidays occurring on nonworking days where employees are not called to work.

In summary, then, the legislative history discloses no purpose to eliminate the forty years' practice of paying gratuity pay in addition to regular pay to employees called in to work on a holiday occurring on a regular working day but, on the contrary, shows concern only with the two problems above referred to. The language of the Resolution is quite apt to cope with these problems, and thus there is no question of disregarding or nullifying any language of the statute on the ground that Congress used such language inadvertently. On the other hand, the language should not be given the additional application contended for by petitioner, which all circumstances indicate Congress did not intend.

The petitioner argues that the fact that annually-paid federal employees receive no premium pay for holidays on which they are called to work created an inequity which it was the purpose of the 1938 Joint Resolution to correct, but there is no evidence whatsoever in the legislative history of that Resolution that Congress was in any way concerned with that particular problem, if indeed there was any problem in a practice which had existed for over 45 years without complaint. The obvious difference between the status of a per diem employee with his greatly more secure tenure and a per diem craftsman who often can work only when weather permits would seem to outweigh any difference in treatment respecting pay for holiday work.

5. Statutes will not be construed to produce absurd or inequitable results. *Helvering* v. *Hammel*, 311 U.S. 504,

511 (1941); *United States* v. *Katz*, 271 U.S. 354, 362. The construction of the 1938 Joint Resolution contended for by the Government would produce extremely absurd results —results already manifested in decisions of the Comptroller General following the 1938 Resolution. See Decision A97265, August 29, 1938, which holds that an employee who was not required to work on a designated holiday occurring on a workday must nevertheless show facts and circumstances to prove that he would have worked but for the sole fact that it was a holiday. In other words, under the Government's interpretation, unless an employee is in fact ready, willing, and able to go to work on the designated holiday, he is not entitled to gratuity pay, despite the fact that he was not required to work on that day. Similarly, if a wage-rate employee were required to work two hours on a statutory holiday, he would be paid only for two hours of labor under defendant's interpretation. Thus, he would actually receive less pay than if he were not required to work on the holiday because he was not "relieved or prevented from working" on that day. Furthermore, it is to be noted that under the Government's construction of the 1938 Resolution and under the ruling of the Comptroller General in the present case, an employee who is required to work on a holiday occurring on a regular workday receives the same pay as but no more than the employee who stays at home. Certainly, it is not to be presumed, without very clear language or without a very clear expression of intent in the legislative history, that Congress was desirous of bringing about such an obviously inequitable result.

6. Petitioner (Petition, p. 17) expresses concern over possible heavy liability on the part of the Government if the decision below is permitted to stand. While this factor has no relevance in respect to a determination of

the meaning and purpose of the 1938 Joint Resolution, it should have been pointed out that there is a strong possibility that most of the claims filed with the General Accounting Office are barred by the statute of limitations. In any event, it is impossible to estimate just what the extent of the Government's liability is, although the probabilities are that the total amount will be far less than that estimated by petitioner.

Conclusion

All of the circumstances, including the legislative history of the 1938 Resolution, consideration of the inequitable results achieved by the Government's interpretation, and the language used in the 1938 Resolution itself, indicate that Congress did not intend, and could not have intended, in 1938, to eliminate the customary practice of paying gratuity pay for days worked on holidays occurring on a regular workday. Furthermore, the 1938 Resolution can be construed as it has twice been construed by the Court below without in any way doing violence to its language and without creating an inconsistency with the 1885 Act.

> "This being the situation, we think that the administrative officers of the Government and the courts have no duty, and indeed no right, to attribute to Congress an intention which, it is morally certain, Congress did not have, by giving to words which Congress used for one obvious purpose, an additional application which, taken literally, they might support. The evil which Congress meant to cure by the words it used, it cured. The additional effect contended for by the Government would destroy a practice which no one had ever even intimated to be an evil, and which responsible officials had, for more than forty years regarded as just and necessary." (Per Madden, J., in *Kelly* v. *United States, supra.*)

It is respectfully submitted that the Petition for Writ of Certiorari herein should be denied.

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Certificate of Service

Copies of the foregoing reply have been deposited in a United States mail box, with postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

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